80-1432

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No.

In The

Supreme Court of the United States

October Term, 1980

ROBERT KENNEY,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered October 29, 1980.

QUESTION PRESENTED

The petition presents a single question: Does a defendant's Sixth Amendment right to counsel attach upon the filing of a federal criminal complaint and issuance of an arrest warrant thereon.

THE PARTIES

All the parties are reflected in the caption to this petition.

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CITATION TO OPINIONS BELOW

The Court of Appeals affirmed petitioner's conviction in a Memorandum Judgment, not reported, annexed as Appendix A. The District Court Opinion of May 13, 1980, delivered from the bench before trial, not reported either, is annexed as Appendix B.

JURISDICTION

The Court of Appeals judgment was entered October 29, 1980. A timely rehearing petition with a suggestion for rehearing en banc was denied December 23, 1980 (App. C). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

PROVISIONS INVOLVED

The question involves the Sixth Amendment to the United States Constitution:

> "In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

as well as Rules 3 and 4(a) of the Federal Rule of Criminal Procedure:

> "The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate." (Rule 3)
>
> * * *
>
> "If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant

> has committed it, a warrant for the arrest of the defendant shall issue to an officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. (Rule 4(a))

STATEMENT OF THE CASE

Robert Kenney is a onetime jazz musician. Victor Herrera is an illegal alien, a federally comvicted prostitution ring operator who avoided deportation by making this case, among others (24-25, 28-30, 100-04).* It may be taken for purposes of this petition that Herrera importuned Kenney to sell heroin to him; that Kenney was friends with one Lincoln Stephens who sold a small sample quantity of heroin to Herrera in Kenney's apartment and a larger quantity in the garage

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* Numbered references, without more, are to the trial transcript. "S" denotes the district court hearing on petitioner's motion to suppress the statements in issue in this petition. The district court denied that motion (App. B).

of Kenney's building; and that Kenney put Herrera and Drug Enforcement Agent Kieran Kobell, posing as a buyer, in touch with Stephens and relayed messages back and forth, knowing the parties were transacting heroin.

This happened in March and April, 1979. In September the United States Attorney for the Southern District drew up and filed with a United States Magistrate a complaint charging Kenney and Stephens with conspiracy to possess and distribute heroin and obtained from the Magistrate a warrant for Kenney's arrest.* A month later Drug Enforcement Agent Sandler went to Kenney's Manhattan apartment to execute the warrant. Sandler gave Kenney Miranda warnings which included telling Kenney about the complaint charge of conspiracy with intent to sell (S 66). Kenney and Sandler also talked about bail and Kenney's being held in jail. At the time Kenney had an elderly and sick mother in Philadelphia and

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* The complaint and indictment are appended to this petition.

was not prepared for confinement (S 108). On the way to DEA headquarters, therefore, Kenney told Sandler that he was "guilty of conspiracy" but not of a sale; that the heroin came from Lincoln Stephens who in turn obtained it from "John" in Queens; and that Kenney would cooperate to help make cases (S 11). The record established beyond dispute that Kenney's statements to Sandler were solely the product of his discussions with Sandler about bail and Kenney's fear therefrom that he would not be able to make bail and would go immediately to jail.*

Thereafter Kenney had a "Pre-Arraignment Interview" with Assistant United States Attorney Stuart Baskin. The interview took place in Baskin's office with a Drug Enforcement

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* Sandler testified that Kenney agreed to cooperate because Kenney thought that otherwise he would have to go to jail (S 23-24). Kenney's testimony (S 70) was the same:

> "He [Sandler] said if I cooperate I wouldn't stay in jail overnight, I could get out on bail."

agent present. Baskin also gave Kenney Miranda warnings, mentioned conspiracy charge, and told Kenney he would be held on $150,000 bail, which Kenney could not make (S 71). Kenney, therefore, told Baskin also that he was "guilty of conspiracy", having introduced the purchaser to a friend (S 106-07). Baskin then arranged for Kenney to have two days to visit his mother in Philadelphia (S 108). Arraignment and assignment of counsel occurred two days later (S 105).

Kenney was subsequently indicted and convicted for conspiracy to sell and aiding and abetting the sale of heroin. The indictment's conspiracy count was the identical charge of the complaint. Part of the Government's direct case proof was Kenney's statement to Assistant Baskin and to Agent Sandler that he was "guilty of conspiracy" (493, 496). The district court (Stewart, J.) sentenced Kenney to fifteen months followed by three years probation, being satisfied after having heard Kenney testify at trial and on the hearing to suppress, that the drug transaction

was "not your [Kenney's] principal way of life, that to some extent at least . . . that you do it as favors for friends" (Sentence Tr., p. 13). The Second Circuit Panel affirmed Kenney's conviction, rejecting the argument that Kenney's right to counsel attached upon filing of the criminal complaint.* Kenney's petition for rehearing with a suggestion for rehearing en banc was likewise denied. The Court, however, stayed issuance of its mandate pending this petition. Order of December 31, 1980.

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* If the right did attach, then it was not waived under the standards demanded in the Second Circuit, United States v. Mohabir, 624 F.2d 1140 (2d Cir. 1980), and Kenney's confession should have been suppressed.

REASONS FOR GRANTING THE WRIT

This case involves an important question in the administration of justice with respect to when the Sixth Amendment right to counsel attaches for purposes of Government interrogation. The Second Circuit, recognizing that the counsel right attaches at least upon indictment and that the standard for waiver is higher than for similar Fifth Amendment rights, United States v. Massimo, 432 F.2d 324, 327 (2d Cir. 1970), United States v. Satterfield, 558 F.2d 655 (2d Cir. 1976), United States v. Lord, 565 F.2d 83 (2d Cir. 1977), now requires that the counsel waiver not be taken by the Government official doing the questioning but by a judicial officer. United States v. Mohabir, 624 F.2d 1140 (2d Cir. 1980). That Court, however, held previously that no counsel right arises pursuant to a criminal complaint. United States v. DuVall, 537 F.2d 15 (2d Cir. 1976); F.R.Crim.P. 3,4(a).

The Second Circuit has again so held in this case. The issue is not only important, involving as it does Government questioning and procedures with respect thereto. Miranda v. Arizona, 384 U.S. 436 (1966); Massiah v. United States, 377 U.S. 201 (1964); Brewer v. Williams, 430 U.S. 387 (1977).* But the Court of Appeals decision is also in conflict with applicable decisions of this Court.**

The reasons why this Court ought grant the petition and hold that the Sixth Amendment right to counsel attaches upon filing of a federal criminal complaint are as follows:

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* The point appears to be open in all the other Circuits.

** Kirby v. Illinois, 406 U.S. 682, 689 (1972); Moore v. Illinois, 434 U.S. 220, 228 (1977); Brewer v. Williams, supra. See also, on custodial interrogation, Oregon v. Mathiason, 429 U.S. 492 (1977); Rhode Island v. Innis, 446 U.S. 291 (1980); Fare v. Michael C., 442 U.S. 707 (1979); Edwards v. Arizona, Dkt. 79-5269.

1. The Sixth Amendment guarantees counsel in all "criminal prosecutions". That means at any time "at or after the initiation of adversary judicial criminal proceedings -- whether by way of formal charge, preliminary hearing, indictment, information or arraignment". Kirby v. Illinois, 406 U.S. 682, 689 (1972). Kirby also makes clear that it is the "adversary" feature that is important, the point at which "the adverse positions of government and defendant have solidified" and "defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law". (406 U.S. at 689-90). Judged by the policy behind the counsel right, as set forth in Kirby, clearly the complaint ought trigger that right: the complaint puts the Government as the "adversary" of defendant; it invokes

the court's process against him; it is a "prosecution"; and it "immerses [defendant] in the intricacies of substantive and procedural criminal law". Kirby v. Illinois, supra, Brewer v. Williams, supra, United States v. Mohabir, supra.

2. Although this Court has not yet addressed the specific issue raised here, it has held in other situations that there is no necessity of an indictment to bring defendant's right to counsel into play. Brewer v. Williams, supra (right to counsel violated by police questioning after arrest and arraignment but before indictment); Moore v. Illinois, 434 U.S. 220, 228 (1977) ("an accused's rights [to counsel] attach to identifications conducted 'at or after the initiation of adversary judicial criminal proceedings' including proceedings instituted 'by way of formal charge [or] preliminary hearing'"). Other courts have held the same

thing. Cannistraci v. Smith, 470 F.Supp. 586, 592 & n. 16 (S.D.N.Y. 1979) (DuVall questioned); United States ex rel Burton v. Cuyler, 439 F.Supp. 1173, 1181 (E.D.Pa. 1977) (counsel required after arrest warrant issues and defendant apprehended, and police attempt to obtain further evidence from defendant); Schilling v. State, 86 Wisc. 2d 69, 271 N.W. 2d 631 (Wisc. Sup.Ct. 1978) ("custodial interrogation"). The Second Circuit has held that the right to counsel attaches when defendant is arrested under a New York State complaint and arrest warrant. United States ex rel Robinson v. Zelker, 468 F.2d 159 (2d Cir. 1972). See also United States ex rel Sanders v. Rowe, 460 F.Supp. 1128 (N.D.Ill. 1978) (same; Illinois law); United States v. Zazzara, 626 F.2d 135 (9th Cir. 1980) (counsel right attaches "upon arrest"). It is illogical and inconsistent that a state defendant's counsel right attaches upon complaint while a federal defendant's does not.

3. Had petitioner's arrest followed indictment, his right to counsel would have attached before he was questioned. Massiah v. United States, supra. No valid distinction can be drawn between a complaint and indictment for interrogation purposes. A prosecution initiated by indictment results in a warrant, an arrest, an arraignment, assignment of counsel, and fixing of bail. Exactly that happens following a complaint. Similarly, questioning after an indictment arrest is to buttress the prosecution's prima facie case, not for investigation or to absolve defendant. The counsel right attaches because defendant should "not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the . . . right to a fair trial". United

States v. Mohabir, supra. No difference exists between questioning after indictment and after complaint which would compel that the counsel right attach only as to the former, not the latter. Indeed if the Government can take a counsel waiver and then question a complaint defendant but cannot do so with an indictment defendant, then the Government will base arrests on complaints rather than indictments, with indictment to follow only after the Government has attempted to obtain an uncounseled confession.

4. This case dealt with a felony complaint, followed by an indictment. On the other hand, when the charge is a "minor offense" triable by magistrate, the accusatory instrument is the complaint. F.R.Crim.P 5(b). It is arbitrary and inconsistent to have the right to counsel attach immediately on the complaint's filing in a minor offense

and yet have no right to counsel until indictment when the case involves a felony.

5. Commencement of a "criminal prosecution", as used in the Sixth Amendment, brings not only the right to counsel but triggers defendant's speedy trial rights. A criminal complaint is a "criminal prosecution" for purposes of the latter. United States v. Marion, 404 U.S. 307 (1972); Barker v. Wingo, 407 U.S. 514 (1974); Dillingham v. United States, 423 U.S. 64 (1975). It is arbitrary and inconsistent that a complaint is not a "criminal prosecution" for purposes of the former.

The error in holding that there is no right to counsel after a complaint arrest is well illustrated by the facts of this case. Before petitioner was arrested the United States Attorney's office reviewed the evidence against him, prepared and filed a complaint which mentioned specifically conspiracy and possession with

intent to sell in exactly the same terms as the later indictment, and secured an arrest warrant from a magistrate (pp. 8-9, supra). In executing the warrant Drug Enforcement Agent Sandler engaged petitioner in a bail discussion, petitioner believed he would be incarcerated for a long time (erroneously the district court held), and to avoid that petitioner gave a confession directly geared to the conspiracy charges in the complaint: "I am guilty of conspiracy but not a sale". Petitioner then was moved to the United States Attorney, with more discussions about bail with the number $150,000 included, and another "I am guilty of conspiracy" confession specifically tied to the complaint and specifically because of petitioner's uncounseled belief that he would have high bail set and have to spend a long time in jail (p. 10, supra).

There is no basis on which this can be constitutionally correct as to petitioner because there was a complaint but incorrect if there had been an indictment. Certainly a defendant is not in a position to dwell on the nuances between a complaint and an indictment. What matters is that the United States Government (not only the arresting officer) has charged him with a crime; a judge (i.e., magistrate) has reviewed the charges and issued an arrest warrant; an agent has arrested him pursuant to that warrant; and now he is being questioned by the agent who has him in custody and wants a confession and then by a Government attorney who has drawn the complaint and heads the prosecution team.

In sum, the fact that there is a court showing of probable cause in a

complaint faces defendant with a posture that has particular consequences. A defense attorney, not federal agents and especially not a federal attorney, ought ordinarily be the one to consider those consequences with defendant since defendant is in the agents' custody and they, as the United States Attorney, are defendants' adversaries, not his allies. Here, what the complaint charged, what evidence supported it, and what petitioner might expect in terms of bail and its relation to cooperation were subjects petitioner should have discussed first with his own attorney, not the Government. Massiah v. United States, supra; Brewer v. Williams, supra.

CONCLUSION

For the foregoing reasons this petition for certiorari should be granted.

Respectfully submitted,

DONALD E. NAWI, ESQ.
Attorney for Petitioner
Robert Kenney

February 18, 1981

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second
t, held at the United States Courthouse in the City of New York, on the
twenty-ninth day of October
ousand nine hundred and eighty.

at:

ONORABLE IRVING R. KAUFMAN

ONORABLE AMALYA L. KEARSE

ONORABLE MYRON H. BRIGHT, sitting by designation,

Circuit Judges,

UNITED STATES COURT OF APPEALS FILED OCT 29 1980 SECOND CIRCUIT

80-1294

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT KENNEY,

Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Appellant's statements to Drug Enforcement Administration agent Sanders and to Assistant United States Attorney Baskin were not obtained in violation of his right to counsel. See United States v. Duvall, 537 F.2d 15 (2d Cir.), cert. denied, 426 U.S. 950 (1976).

APPENDIX A

2. Judge Stewart's charge to the jury on the subject of appellant's credibility was both balanced and fair. See, e.g., United States v. Floyd, 555 F.2d 45 (2d Cir.), cert. denied, 434 U.S. 851 (1977); United States v. Martin, 525 F.2d 703 (2d Cir.), cert. denied, 423 U.S. 1035 (1975).

3. The prosecution's rebuttal summation concerning appellant's entrapment defense did not substantially prejudice appellant, since, on cross-examination, he admitted most of the facts alleged by the Government.

4. The mandate will issue forthwith.

IRVING R. KAUFMAN

AMALYA L. KEARSE

MYRON H. BRIGHT,

Circuit Judges.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
-v-	:	
ROBERT KENNEY,	:	80 Cr. 94(CES)
Defendant.	:	

DISTRICT COURT OPINION, MAY 13, 1980

APPENDIX B

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at least to some extent with the Drug Enforcement Administration and that he appeared in response to a mere telephone request for a meeting at a neutral site, not in his home, not in the police station, not in some place where he would be under circumstances of undue coercion.

Did he agree to such a meeting? That he appeared there and he made the same offhand remarks concerning his co-involvement in the instant offense, the same remarks he had made all along.

Your Honor, under all these circumstances, I think it is clear that each of the statements was voluntary with the defendant fully aware of his rights and choosing in a knowing and intelligent fashion to waive those rights and make the statements he thought in his best interests at the time.

Under all those circumstances the government urges that they should be admissible at trial.

THE COURT: May I see Exhibit 1 and 2?

(Pause)

THE COURT: I am going to deny the motion. It seems to me that on the whole the testimony of Messrs. Sandler, Kobell and Baskin is more credible than that of Mr. Kenny in most respects. I accept the

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statements that they made to the effect that Mr. Kenny was given his Miranda warnings before he made any statements. I was especially impressed by the credibility of Mr. Baskin's testimony about Mr. Kenny's statements to him which confirmed the testimony, of course, of that of Mr. Sandler and Mr. Kobell. I think this was a small point, but, as you will recall, Mr. Baskin was called at the last second without any warning at my request. I am not suggesting that he was totally unprepared, but at least I don't believe up to that point that he had expected to be called to testify for whatever that is worth.

Mr. Kenny indeed admits that he said to, I guess, Mr. Baskin that he had made an introduction involving a proposed sale of narcotics. I don't find anything in the testimony to support the argument of the defendant that he was coerced in order to obtain his cooperation or to pressure him into making some kind of confessions.

I don't find anything in the evidence to suggest that under the circumstances there would have been a high bail fixed, in fact, or that he would have had to remain in jail more than overnight.

As I understand the evidence, the brief

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period postponing the arraignment was at the defendant's request after he entered into agreement waiving arraignment.

The question of whether the proceedings all took place on October 22nd or whether they continued into October 23rd is hard to resolve.

The exhibits that we have all use the date October 22nd. I take it that on Exhibit 1 the date was entered by Mr. Baskin of October 22nd.

Exhibit 2 the date October 22nd on the last page, which appears twice on the last page, the first time, it might have been, it is hard to tell but it could have been in Mr. Kenny's handwriting, I don't pretend to be a handwriting expert. And then there is another date written next to the witness's name which doesn't appear to be in that witness's handwriting, but again I am not an expert.

Certainly the written documents are all consistent that the arrest and the proceedings at the U.S. Attorney's Office all occurred on October 22nd. On the other hand, the witnesses for the government were all clear that it took place on the 23rd.

Mr. Kenny said it was on the 22nd, the same day. However, it doesn't seem to me that I need to

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decide whether it was the 22nd or the 23rd.

In any event, I think the officers, agents and U.S. Attorney conducted themselves properly at all times.

The admitted statements which were made on December 14th the evidence indicates that the defendant at least was purporting to cooperate or was having contacts with the government agents and apparently according to his own testimony did some of the things they asked him to do and although he had a lawyer at that point, he did appear voluntarily at a restaurant where from the evidence it appears that he voluntarily repeated what he had earlier said to the agents and Mr. Baskin.

The fact that Mr. Kenny when he was arrested seemed to be fully aware of the reason for the arrest, I think, is of some significance.

So, on the whole, I think the evidence supports the government's position more than it does that of the defendant and I will deny the motion.

MR. SPANAKOS: If your Honor please, I take exception to your decision, but in particular to the decision concerning December 14th -- the admission made on December 14, 1979.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 23rd day of December , one thousand nine hundred and eighty.

80-1294

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UNITED STATES OF AMERICA,

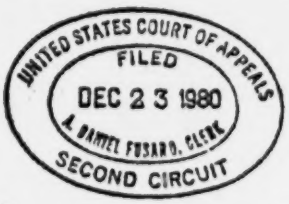
Plaintiff-Appellee,

v.

No. 80-1294

ROBERT KENNEY, a/k/a "Kenneth Pack",

Defendant-Appellant.



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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Robert Kenney,

Upon consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro
A. Daniel Fusaro
Clerk

APPENDIX C

PAW:jlw
9/12/79

Approved: Patricia Anne Williams per Kenneth Wish
PATRICIA ANNE WILLIAMS
Assistant United States Attorney

Before: HONORABLE NINA GERSHON
United States Magistrate,
Southern District of New York

U.S. DISTRICT COURT
FILED
SEP 14 1979
S. D. OF N. Y.
A/Wish Council 9-14-79 4:10 am

79-1070

UNITED STATES OF AMERICA :

- v - : COMPLAINT

T/N - Robert Kenney aka KENNETH PECK and LINCOLN STEVENSON, : Violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A) and 846.

Defendants. :

80 Cr. 0094

SOUTHERN DISTRICT OF NEW YORK, ss.:

FRED SANDLER, being duly sworn, deposes and says that he is a Special Agent of the Drug Enforcement Administration and alleges and charges as follows:

1. From on or about the 1st day of March, 1979 and continuously thereafter up to and including the date of the filing of this complaint, in the Southern District of New York, KENNETH PECK and LINCOLN STEVENSON, the defendants, and others unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance the exact amount thereof being unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof the following overt acts were committed in the Southern District of New York:

1. On or about the 27th day of March, 1979 defendant KENNETH PECK had a conversation with two other persons, including Special Agent Kieran Kobell of the Drug Enforcement Administration, who was acting in an undercover capacity, concerning the sale by him (PECK) of a quantity of heroin.

APPENDIX D

2. On or about the 12th day of April 1979, in the lobby of the building located at 7 West 14th Street, Manhattan, defendant KENNETH PECK had a conversation with two other persons, including Special Agent Kieran Kobell, in which PECK stated that he would have defendant LINCOLN STEVENSON deliver one ounce of heroin to them on the next day.

3. On or about the 14th day of April, 1979 defendant LINCOLN STEVENSON met with a reliable informant at 7 West 14th Street, Manhattan, where STEVENSON sold approximately one ounce of heroin to the said informant for $10,000.

The sources of deponent's information and the grounds of his belief are investigations conducted by him in the course of his official duties, including:

1. Conversations with Special Agent Kieran Kobell of the Drug Enforcement Administration in which he related to me the facts as set forth above in overt acts one and two.

2. Conversations with the informant and with Special Agent Kieran Kobell concerning the facts as set forth in overt act 3 above.

3. Your deponent has been advised that the Drug Enforcement Administration laboratory report on the substance referred to in Overt Act 3 above does, in fact, contain heroin.

WHEREFORE, deponent prays that a warrant may issue for the apprehension of the above named defendants and that they may be arrested and imprisoned, or bailed, as the case may be.

Frederick Sandler

FREDERICK SANDLER
Special Agent,
Drug Enforcement Administration

SEP 14 1979

Sworn to before me this
12th day of September, 1979.

Nina Gershon

NINA GERSHON
United States Magistrate
Southern District of New York

GJF Pt
2/2/80

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA :

- v - :

LINCOLN STEPHENS and
ROBERT KENNY, a/k/a
"Kenny Peck," :

Defendants. :

----------x

INDICTMENT

80 Cr.

COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of March, 1979 and continuously thereafter up to and including October 31, 1979, in the Southern District of New York, LINCOLN STEPHENS and ROBERT KENNY, a/k/a "Kenny Peck," the defendants and others to the Grand Jury known and unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I narcotic drug controlled substances, to wit heroin, the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

APPENDIX E

(1)

SJB:jlw
2/5/80

1. On or about March 27, 1979, ROBERT KENNY, a/k/a "Kenny Peck," had a conversation with two other persons, including a Special Agent of the United States Drug Enforcement Administration who was then working in an undercover capacity, concerning the sale by KENNY and his co-conspirators of a large quantity of heroin.

2. On or about April 12, 1979, at 7 West 14th Street, Manhattan, New York, ROBERT KENNY, a/k/a "Kenneth Peck," had a conversation with two persons, including a Special Agent of the United States Drug Enforcement Administration who was then working in an undercover capacity, in which KENNY stated that he would arrange for LINCOLN STEPHENS TO sell one ounce of heroin for $10,000.

3. On or about April 14, 1979, LINCOLN STEPHENS sold to another person approximately one ounce of heroin for $10,000 cash.

(Title 21, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

On or about the 14th day of April, 1979 in the Southern District of New York, LINCOLN STEPHENS and ROBERT KENNY, a/k/a "Kenny Peck," the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one ounce of heroin and dilutants.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.)

FOREMAN

ROBERT B. FISKE, JR.
United States Attorney

No. 80-1432

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ALEXANDER L. STE
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT KENNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

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QUESTION PRESENTED

Whether a Drug Enforcement Agent and later the prosecutor abridged petitioner's Sixth Amendment right to counsel by conducting pre-indictment interviews with petitioner, where petitioner was admonished prior to each interview that he could have an attorney's help during questioning.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1980 (Pet. App. A). A timely petition for rehearing was denied on December 23, 1980 (Pet. App. C). The petition for a writ of certiorari was filed on February 20, 1981. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to distribute heroin, in violation of 21 U.S.C. 846, and of distributing, and possessing with intent

to distribute, one ounce of heroin, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to 15 months' imprisonment, to be followed by a three-year term of special parole. The court of appeals affirmed (Pet. App. A).

1. The evidence at trial showed that in early March 1979 Victor Herrera, a paid informant for the Drug Enforcement Administration, encountered petitioner at a Manhattan night club (Tr. 30).[1] Petitioner, who had known Herrera since 1974, asked him if he would be interested in engaging in some cocaine business. Thereafter, Herrera and petitioner went to petitioner's apartment, where Herrera told petitioner he was interested in heroin rather than cocaine. Petitioner stated that he had a potential heroin source and made an unsuccessful attempt to telephone his source (Tr. 22-24, 31-33). In the days that followed, petitioner introduced Herrera to his heroin source, Lincoln Stephens. Petitioner later gave Herrera a small sample of heroin, provided by Stephens, in exchange for $500 (Tr. 33-38). Petitioner and Herrera thereafter had a number of telephone conversations concerning arrangements for a larger sale of heroin (GX 11, 12, 13). These negotiations culminated in the basement of petitioner's apartment building with the sale by Stephens of one ounce of heroin to Herrera for $10,000 (Tr. 74-76, 223, 289-291, 345).

2. A complaint was filed and a warrant issued for petitioner's arrest on September 14, 1979 (Pet. App. D). Petitioner was arrested at his home on October 22, 1979. He was given his *Miranda* warnings, and he acknowledged that he understood them (S. 9-10). While being transported to the DEA office, petitioner told DEA agents that he was guilty

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[1] "Tr." references are to the transcript of the trial, held May 13-20, 1980; "S." references are to the transcript of the suppression hearing, held May 12-13, 1980. "GX" references are to Government Exhibits. "Tr." and "GX" references are based on those in the government's brief in the court of appeals.

of conspiracy but felt he was innocent of any sale of heroin. Petitioner stated that the heroin had come from Stephens, that Stephens' source was one "John" from Queens, and that he, petitioner, could introduce the agents to several drug dealers (S. 11). Petitioner was permitted to return home that night upon the understanding that he would return the next day for his initial appearance before a magistrate (S. 12; Tr. 492-495). The next morning petitioner met again with the agents and with an Assistant United States Attorney. He was again given *Miranda* warnings, and he again made essentially the same admissions.[2] At petitioner's request his initial appearance was delayed for two days to allow him to visit an elderly relative in Philadelphia (Tr. 495-496; S. 13-15).

Petitioner was indicted on February 14, 1980, together with his co-defendant Lincoln Stephens (Pet. App. E). Petitioner sought to suppress the statements of October 22 and October 23, 1979, in which he admitted to being guilty of conspiracy. The district court denied the motion (Pet. App. B), and the statements were introduced against him at trial.

ARGUMENT

Petitioner contends (Pet. 12-23) that the district court erred in refusing to suppress his post-arrest statements because they were obtained in violation of his Sixth Amendment rights. In particular, he challenges the court of appeals' reliance on *United States* v. *Duvall*, 537 F. 2d 15 (2d Cir.), cert. denied, 426 U.S. 950 (1976), which holds that the Sixth Amendment right to the assistance of counsel

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[2]Petitioner was not unfamiliar with criminal procedure, having previously been arrested for armed robbery in 1945 and for bribery in 1975 (Tr. 544-545). Petitioner also acknowledged that he had learned that Herrera was an informant, and he was expecting to be arrested (S. 69, 82-83).

during any government interrogation, recognized in *Massiah* v. *United States*, 377 U.S. 201 (1964), does not automatically attach upon an individual's arrest pursuant to a warrant based on a criminal complaint issued under Fed. R. Crim. P. 3. For the reasons explained below (pages 4-7), this is not an appropriate case in which to consider the *Duvall* issue. In any event, we believe *Duvall* is correct, and it does not conflict with any holding of this Court or of any other court of appeals. Accordingly, review by this Court is unwarranted.

1. We note at the outset that, in the district court, petitioner did not base his motion for suppression of the statements here at issue on the Sixth Amendment. Rather, he argued that he had not understood the *Miranda* warnings and that the statements were coerced in violation of his rights under the Fifth Amendment (S. 6, 121-123). The Sixth Amendment was mentioned only as a basis for suppressing similar statements made two months later, which were not used at trial (S. 5-6, 63, 123, 131-132). Because the government and the district court thus were not on notice of the present Sixth Amendment claim, the government lacked a proper opportunity to introduce proof with respect to a waiver of Sixth Amendment rights and the district court had no occasion to rule on the waiver question. Since the facts underlying petitioner's Sixth Amendment claim were well known to him at the time of trial, his failure to assert the claim prior to or during trial would appear to bar its assertion on appeal. Fed. R. Crim. P. 12(f). While the court of appeals nevertheless considered and decided the Sixth Amendment issue (Pet. App. A), it relied on a ground that pretermitted any decision of the waiver question.

Notwithstanding the government's initial lack of notice concerning the Sixth Amendment issue now raised, the evidence introduced at the suppression hearing establishes that petitioner waived any Sixth Amendment rights he may

have had when he gave his statements to the DEA agent immediately following his arrest and, on the next day, to the prosecutor. DEA agent Sandler, whose testimony was credited by the district court (Pet. App. B), testified that he gave petitioner his *Miranda* warnings, including an assurance that petitioner could refuse to answer questions in the absence of counsel and could have an attorney appointed for him if he could not afford one (S. 10). Assistant United States Attorney Stuart Baskin, whose testimony was also credited by the district court (Pet. App. B), testified (S. 111, 116) that before beginning the interview he read petitioner a number of rights from a printed form (S. GX 1), pausing after each sentence to ask petitioner if he understood the statement and to note petitioner's response that he did. The statements read to petitioner included the following (S. 14; S. GX 1):

> You have a right to consult an attorney and to have that attorney present during this interview.
>
> * * * * *
>
> If you do not have funds to retain an attorney[,] an attorney will be appointed to represent you[,] and you do not have to answer any questions before this attorney is appointed and you can consult with him.
>
> * * * * *
>
> Would you like to answer some questions? You may pick and choose those questions you wish to answer and you may stop at any time.

Because petitioner wished to visit an elderly relative that evening in Philadelphia and thus did not wish to be delayed by an appearance before the magistrate, he signed a form titled "Waiver of Arraignment" (S. GX 2), which in three

separate places advised him of his right to counsel.[3] One sentence stated that "I understand I have a right to consult with counsel before signing this document waiving my rights." Another sentence, at the end, directly above the line for petitioner's signature, stated "I do not want a lawyer."

Petitioner contended, in connection with his Fifth Amendment claim, that his incriminating statements were coerced by suggestions that he would be held on high bail if he failed to cooperate. This claim was expressly rejected by the district court, which found nothing in the evidence "to support the argument of the defendant that he was coerced in order to obtain his cooperation or to pressure him into making some kind of confessions" or "to suggest that under the circumstances there would have been a high bail fixed, in fact, or that he would have had to remain in jail more than overnight" (Pet. App. B).[4]

This record shows " 'an intentional relinquishment or abandonment of a known right * * *' " to assistance of counsel (*Brewer* v. *Williams*, 430 U.S. 387, 404 (1977), quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)), on the part of petitioner, who was familiar with criminal procedures, having been twice previously convicted of serious crimes (see note 2, *supra*). It thus seems clear that petitioner's Sixth Amendment claim would have fared no better in

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[3]The term "Waiver of Arraignment" appears to be a misnomer. Arraignment is a proceeding at which a defendant pleads to an indictment or information. Fed. R. Crim. P. 10. The proceeding that occurs when a defendant is arrested, either without a warrant or with a warrant issued upon a complaint, is an "initial appearance" governed by Fed. R. Crim. P. 5, at which the arrestee is advised of his rights and an initial bail determination is made, but at which the arrestee is "not * * * called upon to plead."

[4]Petitioner's suggestion (Pet. 10) that AUSA Baskin had threatened to have him held on $150,000 bail is contradicted by Baskin's testimony (S. 109-110), which was credited by the district court (S. 129-130).

any other circuit than it did in the court below, regardless of whether other circuits would agree with *Duvall* regarding the point at which Sixth Amendment rights to counsel attach. See, *e.g.*, *United States* v. *Woods*, 613 F. 2d 629, 634 (6th Cir.), cert. denied, 446 U.S. 920 (1980); *Government of the Canal Zone* v. *Sierra*, 594 F. 2d 60, 67-68 (5th Cir. 1979); *United States* v. *Brown*, 569 F. 2d 236 (5th Cir. 1978) (en banc).[5]

2. For the reasons stated in the government's brief in opposition to the petition for certiorari in *Aiken* v. *United States*, cert. denied, No. 80-1096 (March 23, 1981) (Br. in Opp. 5-7), an arrest made pursuant to a warrant based upon a complaint under Fed. R. Crim. P. 3 does not mark the commencement of a criminal prosecution for the purpose of *Massiah* rights. *United States* v. *Duvall*, *supra*. (A copy of our *Aiken* brief has been provided to petitioner's counsel.)

We add only that *United States* v. *Zazzara*, 626 F. 2d 135, 138 (9th Cir. 1980), the sole court of appeals decision from another circuit cited by petitioner as contrary to *Duvall*, provides only dictum in support of petitioner's argument, since the *Zazzara* court found no violation of Sixth Amendment rights. We also note that this Court's decisions in *Brewer* v. *Williams*, 430 U.S. 387 (1977), and *Dillingham* v. *United States*, 423 U.S. 64 (1975), do not aid petitioner. In *Brewer*, the interrogation at issue was preceded by the defendant's arraignment, appointment of counsel for him, and an agreement between his counsel and the police that he

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[5]The waiver standard employed in these cases is less stringent than the standard for *post-indictment* waivers of the right to counsel established in *United States* v. *Mohabir*, 624 F. 2d 1140 (2d Cir. 1980). In *Mohabir* the court held, in the exercise of its supervisory power, that "a valid waiver of the Sixth Amendment right to have counsel present during post-indictment interrogation must be preceded by a federal judicial officer's explanation of the content and significance of this right." 624 F. 2d at 1153.

was not to be questioned in the absence of his lawyer. In *Dillingham*, the Court's reference to the arrest as the commencement of prosecution was a reference to an arrest immediately followed by the defendant's presentation before a magistrate for the setting of bail; as the briefs filed in that case indicate (Memorandum for the United States in Opposition at 2, No. 74-6738, 1975 Term), bail was set and the defendant, who had waived a preliminary hearing, was incarcerated for over a month before making bond. Thus, in a passage quoted from *United States* v. *Marion*, 404 U.S. 307, 320-321 (1971), the Court noted that " 'it is either a formal indictment or information or else the actual restraints imposed by arrest *and holding to answer a criminal charge* that engage the particular protections of the speedy trial provision of the Sixth Amendment.' " 423 U.S. at 65 (emphasis added). There is no suggestion that in *Dillingham* the Court was deciding the question whether an arrest pursuant to warrant based on a complaint, without more, would trigger Sixth Amendment rights, including any special rights under *Massiah* that exceed *Miranda* rights under the Fifth Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1981

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